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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioner, Curtiss-Wright Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 17, 1979; Curtiss-Wright's petition for rehearing was denied on June 4, 1979.

Opinions Below

The opinions of the Court of Appeals for the Third Circuit and the District Court for the District of New Jersey appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 17, 1979. A timely petition for rehearing was denied on June 4, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Did the filing of a counterclaim deprive the district court of discretion to grant final certification of judgments in favor of petitioner, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on claims factually and legally unrelated to the counterclaim even though the district court (a) determined that there was no just reason for delay and (b) provided a carefully considered written statement of all relevant factors supporting its entry of final judgment?

(2) Did the district court abuse its discretion by considering the economic loss of more than $1 million per year which would result from a failure to certify as a factor in favor of granting certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure?

Federal Rules of Civil Procedure Involved

The relevant Federal Rule of Civil Procedure is Rule 54(b) which states:

> (b) Judgment Upon Multiple Claims or Involving Mulitiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Statement of the Case

Between May 1, 1968 and December 21, 1972, Curtiss-Wright Corporation ("Curtiss-Wright") entered into a series of 21 military procurement subcontracts with General Electric ("GE"), a prime contractor for the United States Navy. The subcontracts called for Curtiss-Wright to manufacture and deliver 167 large components designed for use in nuclear powered naval vessels. Although Cur-

tiss-Wright has completed the manufacture and delivery of all of the components in conformity with contract specifications, GE has withheld $18,914,408.00 of the contract price. The amount of this unpaid contract balance is not in dispute.

In connection with these subcontracts, Curtiss-Wright brought suit, pursuant to the district court's diversity jurisdiction, against GE alleging fraud, misrepresentation and contractual breaches and seeking damages and reformtion of the subcontracts. In addition, Curtiss-Wright sought payment from GE of the outstanding contract balance—$18,914,408.00. GE, for its part, interposed counterclaims based upon alleged extraordinary assistance rendered by GE to Curtiss-Wright.

The district court granted Curtiss-Wright's motions for summary judgment on those counts of the Complaint which sought to recover the unpaid contract balance of $18,914,408.00 (App. A at 1a). Thereafter, the district court certified these judgments as final and made both (a) the "express direction" for entry of judgment and (b) the determination that there was "no just reason for delay" as required by Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)") (App. A at 10a, 14a).

In an opinion issued concurrently with its order of final certification, the district court provided a carefully reasoned statement in support of its decision to direct entry of final judgment (App. A at 10a). *Inter alia,* the court concluded:

> (1) Certification could not, in any way, result in unnecessary appellate review;
>
> (2) The claims on which certification was granted are separate, distinct, and independent of any of

the other claims or counterclaims involved in the lawsuit;

(3) Certification will not prevent the rest of the case being prepared for trial;

(4) The need for appellate review of the claims on which certification was granted will not be mooted by any future developments in the district court;

(5) The determinations by the district court regarding the claims on which certification was granted will not be changed by later developments in the district court;

(6) Justice to the litigants will be advanced by certification because (a) with prejudgment interest fixed by law at 6 percent simple interest, under modern-day interest rates Curtiss-Wright will suffer daily financial losses ($3,000.00 per day) from the non-payment of the liquidated debts embodied in the certified judgments and (b) due to the complex nature of the remaining claims in suit the delay in payment which would result from a failure to certify would span many months, if not years.

(7) Curtiss-Wright is financially sound and will be able to satisfy a judgment on GE's counterclaim should such a judgment ever be entered.

(8) In the opinion of the district court, all of the above factors in favor of certification outweighed the presence of GE's counterclaim.

The Court of Appeals for the Third Circuit, with one judge dissenting, reversed the district court with the direction to vacate so much of the lower court's judgment as purported to render a final judgment pursuant to

Rule 54(b) (App. B at 17a). The court held that the existence of a pending counterclaim bars Rule 54(b) certification absent "unusual or harsh circumstances." The court also held that the economic loss to Curtiss-Wright which would result from a failure to certify, as described by the district court, could never constitute "unusual or harsh circumstances" justifying the entry of Rule 54(b) certification (App. B at 21a-22a). Curtiss-Wright's petition for rehearing was denied, although four judges voted for the rehearing, three against with two judges recusing themselves (App. C at 37a).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of the United States Supreme Court as to the proper interpretation of Rule 54(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides that the district court may grant final judgment as to one or more but fewer than all of the claims in a case involving multiple claims, provided that the court makes an express determination that there is no just reason for delay and an express direction for entry of judgment.

In the present case, the court of appeals, purporting to rely on its earlier decision in *Allis-Chalmers* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), held that the existence of GE's counterclaim constituted an absolute bar to Rule 54(b) certification absent "unusual or harsh circumstances." The majority opinion did not undertake to define "unusual or harsh circumstances" except to state that the loss in interest to Curtiss-Wright (approximately $1 million per year) is not such a circumstance.*

The holding of the court of appeals in this case and in *Allis-Chalmers,* as interpreted by the majority opinion below, are in direct conflict with the interpretation given to Rule 54(b) by the United States Supreme Court the last time the Court considered the purpose of the Rule, 23 years ago. *See Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956); *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956).

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* In *Allis-Chalmers* itself the court denoted miscellaneous considerations including economic factors, that could constitute "unusual or harsh circumstances," but left the district courts with no indication of how or when to apply these factors. 521 F.2d at 366 & n.14.

In *Sears, Roebuck & Co.* v. *Mackey, supra,* the Supreme Court ruled that the district court had properly certified as final its judgment on less than all of the claims in suit under Rule 54(b). The Court clearly held that where the adjudicated claims were not "so inherently inseparable from, or closely related to" the unadjudicated claims the district court could within its discretion conclude that there existed "no just reason for delay" and enter final judgment on the adjudicated claims accordingly. 351 U.S. at 436.

In the companion case of *Cold Metal Process Co.* v. *United Engineering & Foundry Co., supra,* the Court held that its reasoning in *Mackey* was equally applicable to a situation where, as in the present case, a compulsory counterclaim had been interposed. 351 U.S. at 452-53. Neither in *Mackey* nor in *Cold Metal* did the Court even intimate that the district court's discretion to certify under Rule 54(b) was abrogated by the presence of a counterclaim absent "unusual or harsh circumstances."

In the case at bar, the district court concluded that the claims for the contract balances on which it entered final judgment were indeed "separate, distinct, and independent of" any of the other claims in suit, including the counterclaim (App. A at 11a). The court of appeals did not challenge this conclusion. Accordingly, the finding by the court of appeals that the district court abused its discretion is patently incorrect under the prior decisions of the Supreme Court and unduly restricts the discretion given to the district court under Rule 54(b) to enter final judgment on less than all of the claims in suit. (See the dissenting opinion of Judge Gibbons on the petition for rehearing App. C at 49a). The patent conflict between the decision of the court of appeals in this case and the Supreme Court precedents demands the grant of certiorari to review the judgment below.

2. The decision below is in direct conflict with the Tenth Circuit's interpretation of the discretion afforded to the District Court under Rule 54(b).

Relying on the interpretation of Rule 54(b) enunciated in *Allis-Chalmers, supra,* the Third Circuit has, in its opinion below, established what is, in reality, a hard and fast rule that economic loss, no matter how severe, can never constitute a justification for certification. Supplanting its judgment for that of the district court, the Third Circuit herein concluded that neither (1) the loss of over one million dollars per year under modern day interest rates, even for a period of "many months or years" nor, alternatively, (2) the deprivation of nearly $19 million in operating capital for such a period constituted valid reason for Rule 54(b) certification. (The court also completely ignored the impact of an inflationary period and a tight money market which compounds the loss).

The Third Circuit's interpretation of Rule 54(b) stands in stark contrast to the holding of the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976), cited by the district court in support of its decision to certify. There, the Tenth Circuit held that a delay of 10 months in the collection of a judgment in the amount of only $50,000.00 constituted a "financial injustice" in light of present day interest rates that justified the exercise of the district court's discretion under Rule 54(b). The case at bar, where the certified judgment is in the amount of $18,914,408.00, obviously presents a far more flagrant financial injustice resulting from a failure to certify.

This conflict between the circuits reflects a fundamental confusion as to the meaning and application of Rule 54(b). In such circumstances the grant of certiorari to review the judgment below is mandated.

3. The decision below raises significant and recurring problems concerning efforts to invoke Rule 54(b) and promote sound judicial administration and justice to litigants.

The opinion of the Third Circuit in the present case raises important policy considerations concerning the proper application of Rule 54(b). On this issue, the lower courts have not had the benefit of guidance by this Court for 23 years. There are compelling reasons for the Court at this time to provide coherent standards for the review of Rule 54(b) certification. Justice to the litigants, preservation of Rule 54(b) and overall judicial economy demand that the decision below be reviewed by this Court.

It is the basic purpose of Rule 54(b) to avoid the economic loss and denial of justice occasioned by delay in the collection of a judgment. See dissenting opinion of Judge Gibbons on the Petition for Rehearing, App. C. at at 51a. Rule 54(b) provides the mechanism to avert such financial injustice by making an appeal of the adjudicated claim immediately available. *Sears, Roebuck & Co.* v. *Mackey, supra,* 351 at 432. The Third Circuit's decision herein contravenes that basic purpose by severely and unduly limiting the circumstances under which the district court can certify a judgment as final. The Third Circuit has forbidden a district court to certify a claim as a final judgment whenever a counterclaim has been filed unless the Third Circuit's vague and undefined criteria of "harsh or unsual circumstances" has been met. It is incumbent upon the Court in its supervisory role to preserve the integrity of Rule 54(b) and to provide the lower courts and litigants with clear guidance as to the proper application of the Rule.

In holding that any pending counterclaim bars Rule 54(b) certification, the Third Circuit has issued an open invitation to the filing of facially adequate but substantively weak counterclaims. Except in the rare case where summary judgment on the counterclaim is an available alternative, the possibilities for delay and the encouragement of time consuming and costly litigation are the inevitable results of the Third Circuit's position. The courts of appeals should not utilize Rule 54(b) for the convenience of their own calendars at the expense of the authority vested in the district court to determine the proper time and circumstances to enter final judgment on less than all of the claims in suit.

The present case is illustrative of these detrimental, if not absurd, results. Here payment of a liquidated and undisputed debt in the amount of $18,914,408.00 for goods sold, delivered and in use by GE has been delayed by the mere allegation of an unproven and unliquidated counterclaim involving an alleged expenditure by the counterclaimant of less than two million dollars.* Moreover, GE, as

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* The remainder of General Electric's counterclaim is for what can only be called "pie in the sky" damages which would, in essence, give General Electric a windfall profit in excess of $52 million. General Electric claims that by providing Curtiss-Wright with assistance in performance of the 21 contracts, it prevented Curtiss-Wright from incurring additional costs and from suffering a major default on the contracts, thereby saving Curtiss-Wright in excess of $52 million which GE claims it is entitled to recover on the theory that Curtiss-Wright has been "unjustly enriched."

Thus, General Electric takes the ludicrous position that, if Curtiss-Wright had defaulted, it, Curtiss-Wright, would have suffered a net loss in excess of $52 million, but because of General Electric's technical assistance Curtiss-Wright was given the opportunity to invest large amounts of money and effort to complete the contracts while remaining liable to General Electric not only for the alleged value of the assistance, $1,912 million, but also for the same $52 million! See General Electric's answers to Interrogatory Nos. 54, 69 and 74 (App. D). See also Dissenting Opinion of Judge Gibbons on Petition for Rehearing, App. C at 48a.

a cost plus contractor of the United States, has been reimbursed by the government for its expenditures and thus purports to bring its counterclaim on behalf of the government.* As a result of the decision below, the liquidated debt owed by GE to Curtiss-Wright may not be paid for several years with losses to Curtiss-Wright of several millions of dollars at present day interest rates.

Setting aside the injustice of the situation, the Third Circuit has also been unmindful of the adverse impact of its decision on judicial administration. The district court, the court most familiar with the case and responsible for its management, has concluded that the adjudicated claims constituting the balance of the contract price, $18,914,408.00, are ripe for appeal. Clearly, this Court has held that it is the district court which is in the best position to determine when a final judgment should be entered. *Sears, Roebuck & Co.* v. *Mackey, supra*, 351 U.S. at 437.

In addition, the district court is in the best position to determine "that the counterclaim asserted is so much smaller than the liquidated judgment, or so speculative and difficult of proof, that it would be unfair to delay the entry of judgment while the counterclaimant attempts to prove his case. The judge may even conclude that all of part of the counterclaim is being pressed principally to delay payment on the principal obligation and enter judgment under Rule 54(b) in order to encourage a prompt settlement of the remaining claims in controversy." (Dissenting opinion of Judge Gibbons on Petition for Rehearing, App. C at 47a).

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* See General Electric's answers to Interrogatory No. 61(b)(vii) (App. D at 59a).

The Third Circuit's total disregard of the district court's proper function under Rule 54(b) in the disposition of cases under its control demands the grant of certiorari to review the judgment below. In addition, such a review will afford the Supreme Court an opportunity to furnish to lower courts and the bar much needed guidance as to the standards which shall govern Rule 54(b) certification.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

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[APPENDICES FOLLOW]

APPENDIX A

Opinions and Orders of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-794

CURTISS-WRIGHT CORPORATION,

Plaintiff,

v.

GENERAL ELECTRIC COMPANY,

Defendant.

OPINION

COOLAHAN, Senior District Judge

Plaintiff, Curtiss-Wright Corporation, and defendant, General Electric Company, a prime contractor of the United States Navy, entered into a series of 21 military procurement subcontracts from 1968 to 1972 which called for Curtiss-Wright to produce, for delivery to the United States Navy, various components for use in nuclear submarines and surface vessels. On April 30, 1976, Curtiss-Wright filed a 16-count complaint in this court seeking

damages and reformation with regard to these 21 subcontracts.[1] As permitted by order of this Court on November 18, 1976, plaintiff filed an amendment to and supplemental complaint, (adding counts 17 and 18) seeking, with regard to 12 of these subcontracts, the recovery of the sum of $8,378,536[2] representing the balance allegedly due for goods sold and delivered to defendant over and above the unliquidated damages sought in the original 16 counts of the complaint. It should be noted that there are also counterclaims involved in the instant lawsuit. Jurisdiction over this action exists pursuant to the diversity statute, 28 U.S.C. § 1332.

Curtiss-Wright has moved before this Court for an order granting partial summary judgment as to counts 17 and 18 of the amended complaint. General Electric also has moved for partial summary judgment in its favor as to these counts. The parties agree that the goods involved have already been manufactured and delivered by Curtiss-Wright.

As pointed out above, in the 17th and 18th counts of the amended complaint, plaintiff seeks to recover an $8,378,536 balance allegedly owed on 12 of the subcontracts between the parties. General Electric maintains that its continued withholding of that sum is justified under the

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[1] Plaintiff complains, *inter alia,* of misrepresentations by the defendant during negotiation and execution of the subcontracts and contractual breaches by the defendant during the course of plaintiff's performance.

[2] This figure represents approximately 10% of the aggregate prices set forth in the subcontracts. The remainder has already been paid to Curtiss-Wright by General Electric.

subcontracts involved because a condition precedent to final payment has not been satisfied. The pertinent clause in the subcontracts reads:

> "Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price."

It is the defendant's position that according to this clause, Curtiss-Wright must unqualifiedly release *all* claims against General Electric and the Government relating to the 12 subcontracts in question before it can recover the balance allegedly due under them. Since plaintiff has only offered a qualified release, excepting from the release those very claims it is asserting against defendant in this lawsuit, the defendant maintains that it is entitled to summary judgment on these counts of the complaint because this condition precedent to the right of plaintiff to receive final payment has not been satisfied. The plaintiff, on the other hand, believes that it is entitled to partial summary judgment on these counts, contending that the clause in question should be construed as having no application whatever in this context and thus should not be considered as a bar to plaintiff's right to recover the funds withheld thereunder.

The subcontracts between the parties contain provisions electing New York law as governing "in all respects."

Appendix A

There is no reason why the parties' choice in this regard should not be honored. The pertinent New Jersey choice-of-law principles[3] indicate that the New Jersey courts, if faced with the issues presently before this Court, would honor the New York choice-of-law provisions included in these subcontracts since the applicable New York substantive law does not violate settled public policies of New Jersey and the transaction does bear a reasonable relationship to the State of New York.[4] N.J.S.A. 12A:1-105(1); *Farris Engineering Corporation* v. *Service Bureau Corporation,* 406 F.2d 519, 521 (3d Cir. 1969); *Congress Factors* v. *Malden Mills, Inc.,* 332 F. Supp. 1384, 1390 (D. N.J. 1971).

Plaintiff primarily relies on *Tufano Contracting Corp.* v. *Port of New York Authority,* 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd,* 18 A.D. 2d 832, 237 N.Y.S. 2d 562 (2d Dept. 1963), *aff'd,* 13 N.Y. 2d 967, 244 N.Y.S. 2d 643, 194 N.E. 2d 603 (Ct. App. 1963), in support of its position. In that case, the plaintiff contractor had performed pursuant to a contract with the defendant Port of New York Authority and had thereafter commenced suit against the Authority for the payment of balances allegedly due under the construction contract, for compensation for extra work done thereunder, and for damages due to alleged contractual breaches by the defendant. The parties had included in their agreement a clause similar

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[3] Federal District Court jurisdiction over this case exists because of diversity of citizenship. Thus, New Jersey law must be applied, including New Jersey's choice-of-law rules. *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941).

[4] Both plaintiff and defendant have also agreed in their briefs that New York law is to govern.

Appendix A

in language and effect to the clause involved in the instant case, and plaintiff similarly was moving for partial summary judgment on its claim for the balances due. The pertinent clause read:

> "The acceptance by the Contractor, or by anyone claiming by or through him, of the Final Payment shall be and shall operate as a release to the Authority of all claims and of all liability to the Contractor for all things done or furnished in connection with this Contract and for every act and neglect of the Authority and others relating to or arising out of this Contract, excepting only his claims for amounts withheld by the Authority as hereinafter provided and for interest upon the Final Payment, if this payment is improperly delayed."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. In opposition to the motion, defendant argued:

> ". . . Judgment for plaintiff on its first cause of action could be given at this time only by ignoring the plain provisions of the contract in suit to the effect that acceptance by plaintiff of a final payment operates as a release to the Port Authority."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. This is substantially the same argument being made by General Electric in opposition to Curtiss-Wright's partial summary judgment motion and in support of its own motion for partial summary judgment.

The trial court in *Tufano* pointed out quite correctly that the release clause was valid and would be enforced if a contractor accepted final payment and thereafter at-

tempted to assert claims under the same contracts. 227 N.Y.S. 2d at 708. *See also Brandt Corp.* v. *City of New York,* 14 N.Y. 2d 217, 250 N.Y.S. 2d 407, 199 N.E. 2d 493 (1964); *Buffalo Elec. Co.* v. *State,* 14 N.Y. 2d 453, 253 N.Y.S. 2d 537, 201 N.E. 2d 869 (1964). However, in *Tufano,* the contractor did not accept final payment, but instead filed suit asserting claims both for the final payments and for other contractual relief. The trial court stated that in so doing the "plaintiff did not contract away its right to sue for sums which it had earned," 227 N.Y.S. 2d at 708, and ultimately ruled:

> "... the release clause nowhere prescribes the time when judgment may be entered after such action is brought. Nor does the court consider judgment on the first cause of action to be final payment under the release clause of the contract."

227 N.Y.S. 2d at 708-709. Thus the court was of the opinion that summary judgment on the claim for the balances due did not constitute acceptance of "final payment" for purposes of the contractual provision that acceptance of final payment would operate as a release to the defendant.

The Supreme Court's decision in *Tufano* was affirmed by the Appellate Division and by the New York Court of Appeals. The Appellate Division agreed that plaintiff's acceptance of payment pursuant to the partial summary judgment ruling should not be deemed the equivalent of voluntary acceptance of final payment under the clause in question and thus would not result in the release of its other claims arising out of the contract. The Court of Appeals affirmed without opinion.

The pertinent contractual provision in the present case is strikingly similar to that involved in *Tufano.* It likewise provides that acceptance of final payment by Curtiss-Wright should operate to release General Electric and the Government from "all liabilities, obligations and claims arising under" the various contracts between the parties. According to *Tufano,* the contracts in question do not prescribe the time when judgment may be entered on a claim for the amount withheld after an action such as the present one has been instituted. 227 N.Y.S. 2d at 708-709. Thus the contractual clauses in question are not expressly applicable in the context of the instant motions for partial summary judgment. Therefore, payment to Curtiss-Wright of the balances due pursuant to an order of the Court would not constitute "final payment" as to result in a release of General Electric and the Government from "all liabilities, obligations and claims arising under" the contracts between Curtiss-Wright and General Electric.

The defendant has claimed that *Tufano* is not apposite and that instead *R.J. Marshall, Inc.* v. *Turner Construction Co.,* 139 N.Y.S. 2d 55 (Sup. Ct. 1955), represents the controlling authority under New York case law. In *R.J. Marshall,* a subcontractor had moved for partial summary judgment upon its first cause of action against a contractor for the alleged balance owing under a written contract. The contract in question specifically provided:

> "... Prior to final payment, the subcontractor shall execute and deliver to Turner (the contractor), a General Release in a form satisfactory to Turner, holding Turner and the Owner free and harmless from all claims arising out of, or in connection with, this contract."

139 N.Y.S. 2d at 57. The defendant, in opposition to the summary judgment motion, had alleged that a condition

precedent to paintiff's right to final payment had not been complied with, that being the execution by plaintiff to defendant of a general release as called for by the contract. The court ruled that plaintiff's contention that the condition precedent had been waived by defendant presented a question not properly the subject of summary disposition. The court also held that such a clause could preclude partial summary judgment and would be so enforced.

R.J. Marshall is distinguishable from both *Tufano Contracting Corp.* and the case *sub judice.* In *R.J. Marshall* the parties had expressly provided for the performance of a specific act before the right to final payment was to accrue. In the present case and in *Tufano,* the fact of final payment was fashioned by the contracts to operate as the release. The contracts between Curtiss-Wright and General Electric state that the parties "agree as a condition precedent for final payment, that the Buyer and the Government . . . are released." The fact of final payment was to result in a release of General Electric and the Government, the release being the condition attached to final payment. The pertinent clause in *Tufano* was similar in this respect. The contractual provision in *R.J. Marshall,* however, in requiring a written release before final payment was to become due, might be considered applicable in the context of partial summary judgment. In any event, the relevant contractual provision in the instant case is closer in language and effect to that involved in *Tufano* and thus should also not be considered applicable to the issues presently before this Court. *Tufano Contracting Corp.,* 227 N.Y.S. 2d at 708-709.

Alternatively, to the extent that *R.J. Marshall* may be deemed apposite, that is, to the extent that the contract presently before this Court more closely resembles that in-

volved in *R.J. Marshall* that that in *Tufano,* this Court must now consider *R.J. Marshall* to have been repudiated by the subsequent decisions of the New York courts in *Tufano.*[5] *Tufano's* definition of "final payment" as not including an award by a court pursuant to an application for partial summary judgment must be regarded as also applicable in the *R.J. Marshall* situation as well. The *Tufano* case is the more recent of the two cases and was affirmed with opinion by the Appellate Division and affirmed without opinion by the New York Court of Appeals. Since New York law is to govern,[6] *Tufano* must be considered as the controlling authority in New York on the issues immediatetly before this Court.

For the foregoing reasons, the defendant is not justified in withholding final payment from the plaintiff at this time because of the "final payment" clause in the subcontracts between the parties. Furthermore, any acceptance by Curtiss-Wright of payment from General Electric pursuant to this Court's ruling will not operate to release General Electric and the Government from the other claims of plaintiff Curtiss-Wright which are presently the subject of this lawsuit. The parties in this action agree, and the New York case law is in accord, that the issue of interest due on any moneys withheld is not properly before the Court at this time. Therefore, the Court will not make any ruling on that issue. The parties are instructed to submit an appropriate order.

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[5] The New York courts in *Tufano* did not refer to the opinion in *R.J. Marshall, Inc.* v. *Turner Construction Company.*

[6] See pp. 3-4, *supra.*

Appendix A

LETTER OPINION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N. J. 07102

CHAMBERS OF
JAMES A. COOLAHAN
SR. JUDGE

July 27, 1978

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Gentlemen:

Curtiss-Wright Corp. v. General Electric Co.
Civil Action No. 76-794

Plaintiff, Curtiss-Wright Corporation, has moved for Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which granted to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental

Appendix A

Complaint. Plaintiff's prior motion for Rule 54(b) certification of the order of February 24, 1978, alone was denied by Letter Opinion of February 24, 1978, because at that time the matter of prejudgment interest had not yet been resolved. *See Cinerama, Inc.* v. *Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973).

It is clear that Rule 54(b) certification is not to be granted as a matter of course and that this remedy should be reserved for the infrequent harsh case because of the overload which would otherwise result in the federal appellate courts. Furthermore, it is also well established that the considerations which are involved in a grant of summary judgment are not the same considerations relevant to an order of final certification under Rule 54(b). The essential inquiry is whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants. *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975)

In the instant case, certification of the above orders could not, in any way, result in unnecessary appellate review. The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaims generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District

Court. The determinations by the District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

Justice to the litigants will also be advanced by certifying the above orders. Plaintiff has sustained, and will continue to sustain, losses due to delay in payment of the sums which are owed. Plaintiff will only be entitled to prejudgment simple interest at the rate of six percent per annum pursuant to this Court's order of July 27, 1978, and, because of modern interest rates, will suffer daily financial losses from nonpayment of these liquidated debts. *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). Since several millions of dollars are owed by the defendant, great injustice would result from further delay. In fact, because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years.

The solvency of the parties is not a factor weighing heavily either against or in favor of Rule 54(b) certification under the circumstances of this case. Both the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered. However, it is likewise true that defendant

is able to pay now without awaiting the adjudication of its counterclaims for use as a possible setoff, and that plaintiff will be able to satisfy a judgment in favor of defendant on the counterclaims whenever such judgment is entered.

Although the presence of defendant's counterclaims and the consequent possibility of a setoff recovery are factors weighing against certification, the Court is of the opinion that such is outweighed in this case by considerations favoring Rule 54(b) certification. After balancing all of the factors as outlined above, it appears that there is no just reason for delay and that final judgment should be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978. Accordingly, on this date, I have signed an order to this effect.

JAMES A. COOLAHAN
U.S. Senior District Judge

Original filed with Clerk of the Court

Appendix A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-794

CURTISS-WRIGHT CORPORATION

Plaintiff,

v.

GENERAL ELECTRIC COMPANY,

Defendant.

ORDER

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an order granting Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint, and the Court having considered the moving papers and briefs submitted by the parties, and good and sufficient cause having been shown, for reasons set forth in this Court's letter opinion filed this day,

It is, on this 27th day of July, 1978, ORDERED that final judgment be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978, there being no just reason for delay.

JAMES A. COOLAHAN
U.S. District Judge

Appendix A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

No. 76-794

CURTISS-WRIGHT CORPORATION,

Plaintiff,

—VS.—

GENERAL ELECTRIC COMPANY,

Defendant.

ORDER

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an Order granting Rule 54(b) certification of this Court's Order of August 29, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon Count 19 of the Additional Supplemental Complaint, and good and sufficient cause having been shown, for the reasons set forth in this Court's letter opinion filed July 27, 1978,

It is on this 29 day of August, 1978,

ORDERED, that final judgment be entered under Rule 54(b) encompassing the above referenced Order of August 29, 1978, there being no just reason for delay.

JAMES A. COOLAHAN, U.S.D.J.

Appendix A

Consented to as to Form:

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff, Curtiss-Wright Corporation
By: RALPH N. DEL DEO

HANNOCH, WEISMAN, STERN & BESSER
Attorneys for Defendant, General Electric Company
By: ALBERT G. BESSER

COLE AND GRONER, P.C.
Attorneys for Defendant, General Electric Company
By: ISAAC N. GRONER

APPENDIX B

Opinion, Orders and Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CICRUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued March 22, 1979

Before SEITZ, *Chief Judge,* ALDISERT and ROSENN,
Circuit Judges.

(Opinion filed April 17, 1979)

Appendix B

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(argued)
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Appendix B

OPINION OF THE COURT

PER CURIAM.

In a diversity action by Curtiss-Wright Corp. (Curtiss) against General Electric Company (GE), the district court granted summary judgment to Curtiss on its claims for outstanding balances due on contracts with GE; additional claims arising out of the contractual relationship have not yet been adjudicated. The district court certified that the judgments were final under Rule 54(b) of the Federal Rules of Civil Procedure.

GE appealed the 54(b) judgments. It first contends that the entry of the 54(b) certifications was not consistent with a sound exercise of discretion, and thus requests this court to dismiss the appeals without consideration of the merits.

Curtiss, as subcontractor, entered into 21 subcontracts with GE, prime contractor for the Navy, to build component parts for propulsion systems on nuclear vessels for about $215 million. Most of the claims asserted by Curtiss were based on alleged fraud and misrepresentation by GE which caused cost overruns and prevented Curtiss from making a profit. Three of Curtiss's claims sought payment from GE on the outstanding balances due on the 21 subcontracts. GE counterclaimed for $60 million in costs incurred by it due to Curtiss's alleged failure to perform its contractual obligations competently.

The district court granted summary judgment on the claims for the amount of the outstanding balances and directed GE to pay Curtiss $19 million along with prejudgment interest. It further directed that such judgments were final under Rule 54(b) and stated its reasons for such action.

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GE asserts that the entry of the 54(b) certifications under the circumstances of this case was in direct conflict with the rules announced by this court in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975). We address that contention.

In *Allis-Chalmers* this court stressed that certification should be the exception rather than the rule, and delineated illustrative factors governing the trial court's discretion in certifying a judgment as final under 54(b). 521 F.2d at 364. We went on to state:

> In the absence of unusual or harsh circumstances,[14] we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification.

Id. 366. Footnote 14 to the quoted sentence defined unusual or harsh circumstances as those factors "involving considerations of solvency, economic duress, etc."

The district court addressed the general requirements of *Allis-Chalmers* as they applied to this case, stating that the certification would not result in duplicative appellate review because the claims for final payment were totally distinct from the other issues in the case. It felt for the same reasons that the proceedings in the district court could continue pending the appeal and would not moot any determination of the merits of this appeal. The district court also felt that justice in this litigation would be served by certification because Curtiss would suffer daily financial losses from its inability to achieve a greater return on the $19 million judgment than the 6% interest authorized by New York law. The court also concluded that GE could

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afford to pay and that Curtiss would be able to repay the funds if GE succeeded on its counterclaims.

[We turn to an examination of the reasons given by the district court for certifying these judgments. The first reason given was that certification would not result in a duplication of issues to be resolved after final judgment on all the claims. While this may be so, it is also entirely possible that there will be no need to decide the merits of this appeal if an appeal is taken from the final determination of all claims and counterclaims in this case. We say this because GE represents that the single issue it raises on the merits here will not be raised after final judgment.]*

The practical consideration here is that the court is being asked to say who should have the benefit of the money until the litigation is finally resolved. We think that *Allis-Chalmers* dictates that the matter remain in status quo when non-frivolous counterclaims are pending, and in the absence of unusual or harsh circumstances.

Finally, and of decisive significance, it is tacitly conceded that the only harsh circumstance presented here is Curtiss's inability to use the money from the judgment. The result is indeed harsh from Curtiss's viewpoint, but what if GE prevails on its compulsory counterclaim? How is its loss resulting from the deprivation of the money to be restored? In any event this factor was rejected as controlling in *Allis-Chalmers*. Indeed, this was the primary basis for the dissent in *Allis-Chalmers*. *See* 521 F.2d at 367 (Gibbons, J., dissenting). As a three judge panel, we

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* Portions in [] were subsequently modified by orders of the Court. See App. B at 32a, 33a.

are bound to apply *Allis-Chalmers* here. *See* Third Circuit Internal Operating Procedures, Chapt. VIII, C.

The appeal will be dismissed for want of an appealable order with a direction to the district court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b). Each party shall bear their own costs.

ROSENN, *Circuit Judge,* Dissenting

I respectfully dissent because I believe that the district court's certification of this appeal under Rule 54(b), Fed. R. Civ. P., was not an abuse of discretion.

Curtiss-Wright Corporation ("Curtiss-Wright") entered into twenty-one subcontracts to deliver components to General Electric Company ("GE"), a prime contractor for the United States, for eventual use in the construction of nuclear naval vessels. In connection with these contracts, Curtiss-Wright brought a suit against GE in which Curtiss-Wright sought damages and reformation of the subcontracts, alleging fraud, misrepresentation, and contractual breaches by the defendant. GE then withheld the final payments to Curtiss-Wright for the material manufactured and supplied by Curtiss-Wright, and GE interposed counterclaims alleging that Curtiss-Wright had failed to perform competently, and that as a consequence GE was required to render it extraordinary assistance. Curtiss-Wright then added to its complaint three counts seeking the final payments that GE had held back.

Although it is conceded that Curtiss-Wright had manufactured and delivered to GE the components for which the

final payments were claimed, and GE did not object to the quality of the parts, GE refused to make the payments.[1] In this refusal, GE relied on a contractual provision which, as GE interposed it, conditioned the final payments on Curtiss-Wright's release of all claims against GE. Because Curtiss-Wright was suing GE for fraud, misrepresentation, and contractual breaches, it would not assent to any such release. Applying the law of New York in this diversity suit, the district court ruled that, notwithstanding the contractual provision on which GE rested its argument, Curtiss-Wright was entitled to judgment on its claims for the final payments. The partial summary judgment won by Curtiss-Wright amounted to nearly 19 million dollars. The district court then certified its judgment for immediate appeal, while retaining jurisdiction over Curtiss-Wright's other claims and GE's counterclaims.

In *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975), this court set out several considerations that a district court should take into account when it rules upon a motion for certification under Rule 54(b). Unless, in weighing these factors, the district court has abused its broad discretion, we may not disturb its decision in favor of certification. *Id.* at 367 n.16. *See Sears Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 437 (1956). The Rule "defines finality in terms of what the district

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[1] It is undisputed that as of September 23, 1976, Curtiss-Wright had made and General Electric had accepted delivery of all of the large components called for by twelve of the twenty-one subcontracts which formed the basis for the district court's partial summary judgment. By August 28, 1978, GE had accepted delivery of the parts manufactured by Curtiss-Wright under the remaining nine subcontracts.

court does and gives this court broad discretion in applying finality." 6 Moore's Fed. Practice ¶ 54.28[1].[2]

In my judgment, the trial judge identified two considerations of sufficient gravity to justify his exercise of discretion. First, Judge Coolahan noted an economic consideration favoring immediate appeal. *See Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra* 521 F.2d at 364. He concluded that Curtiss-Wright, under New York law, can recover prejudgment interest of only six percent. The interest on the award already granted by the district court will continue in the face of the high cost of money to accrue at this comparatively low rate until Curtiss-Wright can execute on its judgment. If this court were to hear the appeal certified by the district court and to sustain the district court's judgment, Curtiss-Wright could execute immediately. Because of the disparity between six percent simple interest and the much higher interest rates now prevalent in the marketplace, Curtiss-Wright will lose (as GE conceded at oral argument) over a million dollars per

[2] Because federal rules provide extensively for the presentation of numerous claims that are often diverse, unrelated, and involve multiple parties, "it was highly desirable that the district court be given broad powers to enter separate judgments. . . ." 6 Moore's Fed. Practice ¶ 54.22. The Rule gives the trial judge the necessary elasticity because he has firsthand information as to the litigation, its progress, and the timeliness for a separate judgment and appellate review. He is in "an excellent position to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment of the litigation with respect to a single claim in the multiple claims suit and thus to open the way to immediate appellate review and execution of judgment." Bendix Aviation Corp. v. Glass, 195 F.2d 267, 272 (3d Cir. 1951) (Maris, J.).

year until this litigation can be finally consummated. This could conceivably take years to complete.[3]

The Tenth Circuit accepted a similar argument in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976). The court considered a delay as brief as ten months in collecting a judgment, although very much smaller than the one *sub judice,* to constitute "a financial injustice" in the face of a high interest rate in the market. *Id* at 493. Judge Coolahan cited that case in support of his certification.

The prediction about Curtiss-Wright's losses assumes that if Curtiss-Wright's judgment were satisfied now, the company, by outside investment of the proceeds, could secure a rate of return approximating the interest available in the market. But Curtiss-Wright might have, as it indicated at oral argument, a more efficient use for the money if it devoted the 19 million dollars to its own operations. Even for a large corporation, such as Curtiss-Wright, a block of capital as great as this can play a significant part in the operations of the economy.

This is not to say the district court should certify every money judgment carrying prejudgment interest of less than the market rate. Such a conclusion would conflict with *Allis-Chalmers,* which suggested that a district court ascertain whether the action before it is "the infrequent harsh case" warranting certification. But when the judgment is for a very large sum of money, and the current

[3] The district court also noted that "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years." He concluded that "great injustice would result from further delay."

cost of money is exceptionally high, the substantial loss to the creditor caused by further delay must be weighed by the court. In assessing economic considerations, a district court should weigh the size of the judgment, the degree of disparity between market interest and prejudgment interest, and the importance of the award for the prevailing party, as well as the other considerations recognized by *Allis-Chalmers*.[4] In this case, the district court touched all of these bases.

In putting aside the district court's careful considerations, the majority stresses the existence of GE's counterclaims. It relies on the passage in *Allis-Chalmers* that the presence of a counterclaim, in the absence of unusual or harsh circumstances, "weighs heavily against the grant of 54(b) certification." 521 F.2d at 366. But note 14 of that opinion suggested, without limitation, that "unusual or harsh circumstances" referred to "considerations of solvency, economic duress, etc." In the present case, the majority notes that GE's counterclaims are not frivolous, and it argues that the district court identified no "unusual or harsh circumstances" justifying certification. The disparity of interest rates, it urges, cannot constitute "unusual or harsh circumstances" because "this factor was rejected as controlling in *Allis-Chalmers*." By this statement the majority evidently means that, despite the presence of losses due to interest rates, *Allis-Chalmers* allowed the posibility that certification there might have been improper. I disagree with the majority's analysis about the effect of GE's counterclaims.

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[4] Even if *Allis-Chalmers* did not develop the contours of the meaning of "economic considerations," 521 F.2d at 364, that opinion observed that it did not exhaust the catalog of factors. 521 F.2d at 364 n.6.

Allis-Chalmers did not hold that the deprivation of the use of money would never constitute "unusual or harsh circumstances" outweighing the existence of counterclaims. Indeed, the majority in *Allis-Chalmers* never even reached the *merits* of the district court's certification; it focused only on the mischief of unbridled certifications and the necessity for a statement of reasons by the district court when it grants a 54(b) certification:

> Notwithstanding the stridency of the dissent, our holding is not that this was an improper case for Rule 54(b) certification. We have remanded *only* for a *statement of reasons* so that this court may properly determine if this was "the infrequent harsh case" warranting final certification. . . .
>
> We express no opinion on the dissent's analysis of the factors to be considered by the district court because, in the view we take, that is a proper function for the district court. Our consideration of such factors is only to determine whether the district court abused its discretion in granting final certification.

Allis-Chalmers Corp. v. *Philadelphia Electric Co., supra* 521 F.2d at 367 n.16 (original emphasis).

Nothing in *Allis-Chalmers* forecloses the conclusion that it would be unreasonable—even harsh—to prevent Curtiss-Wright's use of the proceeds from a 19 million dollar judgment. The district court properly examined the size and importance of Curtiss-Wright's prospective losses. In this connection, one should not minimize the effect, even upon a large corporation, of a deprivation of the use of almost 19 million dollars in operating capital since Septem-

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ber 1976, especially during an inflationary period and in a tight money market.

It is true, as the majority contends, that GE may ultimately prevail on its counterclaims and that, in this event, GE and not Curtiss-Wright would have suffered the deprivation of 19 million dollars during the interim. It is also true, however, that GE may fail in its counterclaims, so that the disadvantage would be placed on Curtiss-Wright. Unlike the majority, I do not read *Allis-Chalmers* to dictate "that the matter remain in status quo when non-frivolous counterclaims are pending." Rule 54 gives the district court discretion, it seems to me, to consider the size of the loss due to a disparity in interest rates, the indefinite deprivation of substantial working capital advanced in behalf of GE, and the consequent importance for the litigants.

In the context of Rule 54(b), which contemplates that delay in reviewing partial judgments may be harmful and oppressive, our standard of review is limited to ascertaining whether the district court abused its discretion when it certified "there is no just reason for delay" and directed the entry of final judgment upon three of the claims aggregating approximately 19 million dollars. This court may not and should not substitute its judgment for that of the district court. *Allis-Chalmers* only directs the district court to articulate its reasons when it directs the entry of a final judgment on fewer than all the claims. Our review function on the certification should be merely an inquiry as to whether the justification proffered has a reasonable basis.

In any event, the passage from *Allis-Chalmers* concerning counterclaims does not designate the existence of a

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counterclaim as absolutely decisive, even in the absence of harsh circumstances. Otherwise, the assertion of any counterclaim, even one contrived, would defeat the possibility of certifying an appeal under Rule 54(b), a situation hardly contemplated by the authors of the Rule. [*Allis-Chalmers* only prescribed that the district court weigh a counterclaim "heavily." There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims.

Although the district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review[5] the majority asserts that if this appeal

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[5] Judge Coolahan concluded that certification would not in any way result in unnecessary appellate review.

> The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaim generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District Court. The determinations by the District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

is dismissed, the issues now presented may no longer exist in an appeal from a later judgment on the whole case. The basis for this possibility lies in the nature of Curtiss-Wright's contract claims for the final payments. GE is resisting the claims on the sole ground that Curtiss-Wright still has other claims outstanding against it. When Curtiss-Wright has litigated all of these other claims, GE will acknowledge the 19 million dollar debt it owes Curtiss-Wright.

But suppose, as the district court concluded, that New York law rejects GE's interpretation of the contractual provision on which GE relies in resisting payment. Waiting for this contract issue to disappear in a later appeal would be effectively to enforce GE's incorrect view of New York law. GE contends that, by virtue of its contract as interpreted under the law of New York, the company may delay its final payments until all other claims against it have been resolved. Because the court dismisses this appeal as improperly certified, this contract issue will indeed vanish. But the reason will be that, even though the law of New York rejects GE's asserted right to delay payment, GE will have achieved fully by our preclusion of the appeal what it sought through its argument on the merits.[6]

I do not mean to suggest that this result would violate the rule of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), which requires federal courts, sitting in diversity, to apply state substantive law. I do mean to say that the danger of an oblique victory for GE's contract defense,

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[6] Although under *Allis-Chalmers,* the possibility that a claim may be mooted counts against certification, *Allis-Chalmers* refers to a dif-

(Footnote continued on following page)

accomplished by the preclusion of this appeal, bears on whether the district court abused its discretion in certifying the judgment under Rule 54(b).]

Being persuaded that the district court did not abuse its discretion, I would reach the merits of the contract issue. For the reasons so well expressed in the district court's opinion, I would sustain the summary judgment in favor of Curtiss-Wright.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Footnote continued from preceding page)

ferent sense of mootness from that involved here. *See* Allis-Chalmers Corp. v. Philadelphia Electric Co., *supra* 521 F.2d at 364 & n.8. On the issue of mootness *Allis-Chalmers* cited Panichella v. Pennsylvania R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958), in which the district court certified a claim asserted by the defendant against a third party. As the court, in *Panichella* wrote, "the third-party claim is so completely incidental to and dependent upon the principal claim that there can be no recovery upon the third-party claim unless the plaintiff shall prevail on the principal claim." *Id.* If, in *Panichello,* the third-party claim became moot, the parties litigating the claim would have lost nothing by the delay in review, and judicial resources would be conserved. Decision on the mooted claim could truly be avoided. Here, by contrast, the delay in review hurts Curtiss-Wright, because the basis of mootness will be that GE, through the delay, will have already gained the very point it seeks in its substantive argument. This court, in effect, will not avoid decision on the mooted claim; it will have effectively decided the claim in favor of GE.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge,* ALDISERT and ROSENN, *Circuit Judges*

ORDER AMENDING OPINION

It is ORDERED that the first full paragraph on page 4 of the printed slip opinion in the above captioned matter, filed on April 17, 1979, be and hereby is deleted.

BY THE COURT,

SEITZ
Chief Judge

DATED: May 11, 1979

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2179
78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 76-0794

Before SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*

ORDER AMENDING DISSENTING OPINION

The dissenting opinion in the above-entitled matter, filed April 17, 1979, is amended as follows:

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1. The text is deleted from line 23 at page 10 of the slip opinion, beginning with the words "*Allis Chalmers* only prescribed," through the end of line 8 on page 12, which concludes with the words "judgment under Rule 54(b)", including footnote 6.

2. The following paragraph is substituted in place of the deleted text:

> There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims. The district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review.[5]

3. Footnote 5 is retained as it is in the original slip opinion.

MAX ROSENN
Circuit Judge

Dated: May 21, 1979

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 22, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the above entitled appeals be, and the same are hereby dismissed for want of an ap-

Appendix B

pealable order and the cause remanded with a direction to the said District Court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b), all in accordance with the opinion of this Court. Each party to bear its own costs.

Attest:

THOMAS F. QUINN
Clerk

April 17, 1979

Certified as a true copy and issued in lieu of a formal mandate on June 12, 1979.

TEST:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

Opinion of the United States Court of Appeals for the Third Circuit on Plaintiff's Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 & 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and HIGGINBOTHAM, *Circuit Judges.**

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

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* Judges Hunter and Garth did not participate in the consideration of this matter.

Appendix C

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

For the reasons pointed out by Judges Rosenn and Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

By The Court

Aldisert
Judge

Dated: June 4, 1979

Appendix C

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

(D.C. Civil No. 76-0794)

Dissenting Opinion Sur Denial of
Petition for Rehearing

(Filed—June 4, 1979)

Gibbons, *Circuit Judge,* dissenting:

I dissent. In a casual *per curiam* opinion[1] the panel majority, without analysis or explanation, has established a virtual *per se* barrier to Rule 54(b) certification in civil damage actions involving counterclaims. With similar un-

[1] Internal Operating Procedure V.B.1. specifies that *per curiam* opinions are to be reserved for "those cases where the law is relatively clear and does not necessitate a signed opinion." With deference, I suggest that Judge Rosenn's opinion persuasively demonstrates that this is not a proper case for a *per curiam* disposition.

illumination the panel majority also adopts the rule that financial hardship should never be a justification for Rule 54(b) certification unless the claimant is insolvent. These extraordinary holdings find no support in the prior law of this circuit and run directly counter to the spirit and purpose of Rule 54(b). If applied literally and consistently, they will sharply limit the effective use of Rule 54(b) in this circuit, with resulting harm both to litigants and to the ability of district judges to expedite the disposition of cases. This threat to the integrity of the Rule 54(b) certification process is worthy of the court's *en banc* attention.[2]

I. The Facts

This suit is a paradigmatic example of a complex commercial litigation. It grows out of the performance, over a period of nearly a decade, of 21 subcontracts for the production of nuclear propulsion components. These subcontracts had a total value of $215 million. Curtiss-Wright's initial complaint pleaded 16 counts of fraud, misrepresentation, and breach of contract on the part of General Electric in the performance of various subcontracts. Three counts later added by an amended complaint sought $19 million in contract price balances owed under the 21 subcontracts. The latter claims are the subject of this appeal.

General Electric's counterclaim is in two parts. Counts I-IV of the counterclaim constitute a single attempt to

[2] This dissent necessarily retraces some of the ground covered in Judge Rosenn's thoughtful dissent from the panel opinion, with which I fully agree. I write separately only to stress certain features of this case which make it a particularly worthy subject for *en banc* reconsideration.

recover, on different theories, for $1.9 million in costs incurred as the result of "extraordinary efforts" in the nature of technical assistance provided to Curtiss-Wright during the performance of the 21 contracts in suit. Count V sweeps more broadly. In it, General Electric claims that the same "extraordinary efforts" for which it seeks to recover in Counts I-IV of the counterclaim enabled Curtiss-Wright to avoid a contract default and a consequent loss of $52 million. General Electric asserts a claim to that $52 million on the theory that Curtiss-Wright has been unjustly enriched by what it never gained, but did not lose.

The facts underlying most of the claims in this extraordinarily large and complex commercial dispute are hotly disputed. Reviewing the case, the district court concluded that full resolution of all of the issues in the case would require "many months, if not years." Certainly this court is in no position to contest that conclusion. Curtiss-Wright's $19 million claim on the subcontracts, however, is not subject to factual dispute. General Electric has accepted the Curtiss-Wright components, has found no fault with them, and has used them in the performance of its prime contract with the Navy. Its sole defense to the claims to payment on the subcontracts is Article 5(c), a provision in each agreement which requires that as a condition to final payment Curtiss-Wright must release all claims arising out of the performance of that agreement. General Electric contends that so long as Curtiss-Wright's 16 claims remain pending Article 5(c) constitutes a bar to recovery of the undisputed contract balances. The application and interpretation of Article 5(c) to the 16 claims presents a pure question of law which the district court decided in Curtiss-Wright's favor. With the exception of that legal issue, there is no dispute that Curtiss-Wright is entitled to final payment upon the subcontracts.

II. The District Judge's Decision

With the case in this posture, more than two years after the filing of the original complaint, the district judge granted Curtiss-Wright's motion for summary judgment on the three subcontract claims. The court then made both the "express direction" for entry of judgment and the determination that there was "no just reason" for delay required by Rule 54(b). In doing so, it complied fully with this court's decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975), by providing a carefully considered written statement of reasons supporting the decision to direct entry of a final judgment. In that statement the court noted that the certification remedy was to be reserved for "the infrequent harsh case." Moreover, he found that the presence of General Electric's counterclaim, and the consequent possibility of a setoff, militated against certification. But on balance, he concluded that sound judicial administration and fairness to litigants would ultimately be advanced by certification. With regard to judicial administration, the court found that the certification of the order as a final judgment could not result in unnecessary or duplicative appellate review: the contract claim was "separate, distinct, and independent of any other claims in this lawsuit," and would not be mooted by further proceedings in the case. The district court also concluded that certification would cause delay or inefficiency at the trial court level, since the other claims in the case could be prepared for trial during the pendency of the appeal.

On the issue of fairness to the litigants, the district court noted that until judgment was entered on the contract counts Curtiss-Wright would be entitled only to 6% prejudgment interest on its $19 million claim, and would be required to absorb the difference between that rate and the much higher market rate of interest, thereby suffering "daily financial losses from nonpayment of these liquidated debts." This injustice, the court concluded, could prove exceptionally severe since "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification were denied would span many months, if not years."

III. The Panel Majority Opinion

The panel majority opinion rejects the district court's carefully considered decision on two grounds. First, it postulates that *Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra,* establishes blanket presumption against the certification of separate claims where a counterclaim is pending. Second, it holds as a matter of law the district court could not have viewed the loss of over one million dollars in annual interest, even for a period of "many months or years," as a "harsh circumstance" sufficient to overcome that presumption and permit an immediate appeal. It therefore concludes that, despite the district judge's unchallenged finding that this appeal poses no risk of delay or wasted effort at either the trial court or appellate level, the decision to enter final judgment on the $19 million claim must be reversed.

IV. The Panel Majority's Use of Precedent

The panel majority opinion effectively holds that the district court may not enter a Rule 54(b) money judgment in an action in which a non-frivolous counterclaim has been

filed unless the party seeking to recover on the judgment is insolvent. The opinion makes no serious effort to justify this result. Rather, it asserts that its decision is compelled by this court's decision in *Allis-Chalmers*. In support of this conclusion, however, it cites not to the *Allis-Chalmers* majority opinion, but to my *dissent* in that case.

I am underwhelmed. First, as Judge Rosenn points out,[3] Judge Garth's majority opinion in *Allis-Chalmers* stresses that the reversal and remand of the Rule 54(b) certification in that case did *not* rest on a determination "that this was an improper case for Rule 54(b) certification." 521 F.2d at 367 n.16. According to the *Allis-Chalmers* court the remand was "*only* for a *statement of reasons*," and "express[ed] no opinion on" the merits. *Id.* (emphasis in original). Second, contrary to the panel majority's assertion, my dissent in *Allis-Chalmers* was not directed to the majority's improper evaluation of the merits of the certification, but rather to its unprecedented and unwarranted imposition of a "statement of reasons" requirement in a case where the justification for certification was glaringly apparent on the face of the record. This is evident from even a cursory reading of the passage cited by the panel majority. *See* 521 F.2d at 367. Finally, although *dicta* in *Allis-Chalmers* might be read to cut against certification here, there is, as Judge Rosenn demonstrates,[4] other language in the opinion which would permit and indeed encourage the result reached by

[3] Dissenting Opinion at 9.

[4] Dissenting Opinion at 8.

the district court.[5] The majority's unsupported conclusion that *Allis-Chalmers* controls here simply cannot be credited.

V. Analysis

The fact that the panel majority opinion is neither controlled nor supported by prior precedent does not of course demonstrate that its holding is erroneous, or that it warrants the court's *en banc* consideration. Thus I turn to the substance of the panel majority's argument.

A. *The Creation of a Presumption against Certification in Suits involving Counterclaims*

The first holding is that the presence of a counterclaim is an action for money damages creates a presumption against a Rule 54(b) certification. This is a gross oversimplification of the Rule 54(b) inquiry, and conflicts with prior decisions of the Supreme Court and of this court sitting *en banc*. True, "[t]he district court's discretion in entering a Rule 54(b) certificate where a counterclaim is involved should be exercised with special care." 6 *Moore's Federal Practice* ¶ 54.35 at 585 (2d ed. 1976). The reason is straightforward: experience shows that in cases where a counterclaim (particularly a compulsory counterclaim) has been filed, there is an increased possibility that there

[5] It is worth noting that the district judge in *Allis-Chalmers* clearly did not regard that decision as barring Rule 54 certification of a money judgment when a counterclaim was pending. On remand, after preparing the "statement of reasons" demanded by the *Allis-Chalmers* majority, he immediately reentered judgment upon the claim. *See Note,* 54 N.C.L. Rev. 1265, 1274 n.58 (1976).

will be some "just reason" to delay the entry of judgment. For example, the presence of a compulsory counterclaim may indicate that there is a risk that in a second appeal from judgment on the counterclaim the court of appeals will be required to consider virtually the same factual and legal questions presented in the Rule 54(b) appeal. *Panichella* v. *Pennsylvania R.R. Co.*, 252 F.2d 452, 455 (3d Cir. 1958). In other counterclaim cases, there may be a risk that a Rule 54(b) appeal will simply "delay the trial of the [counterclaim] without in any way simplifying or facilitating its future litigation." *Id.* at 455; *Campbell* v. *Westmoreland Farm, Inc.*, 403 F.2d 939, 942 (2d Cir. 1968).

The mere fact that a non-frivolous counterclaim has been filed, however, does not demonstrate that either of these risks is present. There will frequently be cases, like this one, where there is no risk of duplicative appellate review or unwarranted delay of the proceedings in the trial court. In such cases, the fact that a counterclaim has been filed is an essentially neutral factor in the Rule 54(b) analysis. The presence of that claim of course creates a risk that the plaintiff will ultimately be required to pay back a portion of the Rule 54(b) judgment. But there is an equal risk that the counterclaimant will fail to prove his case at trial and will have to pay out. Common sense suggests that where both parties are solvent the party whose claim is liquidated in amount and reduced to judgment generally has the stronger claim to possession of the disputed fund during the litigation of the remaining claims. *See,* Comment, 56 B.U.L. Rev. 579, 592-93 (1976).[6]

[6] The *dictum* in *Allis-Chalmers* that the presence of a counterclaim in a case "weighs heaviy against the grant of a 54(b) certification," 521 F.2d at 366, thus sweeps too broadly and ought not to be followed.

It is here that the central role of the district judge in the operation of Rule 54(b) emerges. If he determines that the counterclaim is substantial and likely to succeed if pressed to judgment, he may well conclude that certification is unwarranted. On the other hand, the judge may also decide that the counterclaim asserted is so much smaller than the liquidated judgment, or so speculative and difficult of proof, that it would be unfair to delay the entry of judgment while the counterclaimant attempts to prove his case. The judge may even conclude that all or part of the counterclaim is being pressed principally to delay payment on the principal obligation, and enter judgment under Rule 54(b) in order to encourage a prompt settlement of the remaining claims in controversy.

The relationship between Rule 54(b) certifications and settlements is, from the viewpoint of the district courts, particularly significant. In commercial litigation it requires little imagination for lawyers to conjure up facially plausible though factually weak counterclaims Experienced lawyers and judges are all to familiar with the possibilities for delay inherent in liberal federal discovery rules. District judges on the scene are particularly well situated to exercise informed judgment as to when the entry of a final judgment on a complaint will remove the incentive for time consuming and costly litigation over "imaginative" counterclaims. They are, moreover, conscious of the fact that resolution, favorably or unfavorably, of a legal issue dispositive of the plaintiff's claim will frequently produce a climate in which serious settlement negotiations will commence and often succeed. The concern of appellate judges for their own caseloads should not blind them to the reality that by limiting the use of Rule 54(b) they are depriving their brothers in the district court of a significant tool in the management of trial court caseloads.

This case is illustrative. The district judge, on the basis of his personal knowledge of the case, concluded that the presence of General Electric's counterclaim was not a just reason for delay. Curtiss-Wright's liquidated, undisputed claim for nearly $19 million is opposed by an unliquidated, unproven counterclaim for $60 million. But only $1.9 million of that counterclaim is alleged to represent money actually spent by General Electric. The remaining $52-odd million is claimed on the theory that because General Electric spent $1.9 million and thereby helped Curtiss-Wright to avoid a costly default on the subcontracts, it is therefore entitled to recover from Curtiss the $52 million that Curtiss-Wright would have lost in that default on a theory of unjust enrichment. Without expressing definitive views on the merits of the counterclaim, I think it obvious that the district judge concluded, as I do, that it would be unfair to require the plaintiff to finance the prosecution of this claim with its admitted, liquidated judgment. Nor do I regard it as fatal to the certification that the district judge did not list his skepticism about the merits of the counterclaim as a factor in his *Allis-Chalmers* statement. While a judge may not want to appear to prejudge a highly speculative counterclaim, when exercising a judgment as a Rule 54(b) certification he can hardly be blind to its likely worth or to the probability of its settlement when it ceases to serve as an instrument of delay. The district judge may—and often must—rely in his discretionary decisions upon considerations which propriety dictates cannot and should not be placed on the public record. Where, as here, the trial court's *Allis-Chalmers* statement correctly concludes that immediate appeal would not result in any duplicative review or delay of the trial court proceedings, deference to the district court's appraisal of the justice and practicality of entering an immediate judgment is surely appropriate.

The majority opinion strips the district courts in this circuit of the power to make this sort of discretionary Rule 54(b) determination in all cases involving counterclaims. That result, I submit, is squarely contrary to the well-settled principle that the timing of a Rule 54(b) certificate "is, with good reason, vested primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). *Accord, Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 272 (3d Cir. 1952) (*en banc*) (Maris, J.); 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2659 at 75 (1973); 6 *Moore's Federal Practice* ¶ 54.28[1] at 364; ¶ 54.41[3] at 741 (2d ed. 1976).

The holding is also inconsistent with this court's decisions in *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 221 F.2d 115 (3d Cir. 1955), *aff'd*, 351 U.S. 346 (1956), and *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267 (3d Cir. 1952) (*en banc*). Both cases upheld the jurisdiction of the court of appeals over claims certified under Rule 54(b) despite the pendency in each case of a compulsory counterclaim, and in the absence of any harsh or unusual circumstances beyond those present in this case. In *Cold Metal Process*, the appeal was from a money judgment entered in a complex commercial case. Despite the presence of a compulsory counterclaim, this court concluded that the appeal was "the very kind of thing Rule 54(b) was written to provide for" and held that the district court had not abused its discretion in authorizing it. 221 F.2d 115, 115. The Supreme Court agreed. 351 U.S. at 450-51. *Bendix Aviation Corp.* v. *Glass, supra*, an *en banc*

decision, reviewed a dismissal of plaintiff's claim for specific performance, certified under Rule 54(b), despite the presence of an unadjudicated counterclaim. These cases directly controvert the majority's holding that the pendency of a counterclaim is, without more, a "just reason" for delay under Rule 54(b). That holding is both inconsistent with precedent and unsound on policy grounds.

B. *The "Financial Hardship" Holding*

Because of the panel majority's erroneous view of the effect of the counterclaim upon the Rule 54(b) determination, it skews the Rule 54(b) determination by requiring a showing of "harsh circumstances" in order to justify appeal. Even if I agreed with its position on the effect of the counterclaim, however, I could not accept the panel majority's assertion that for a solvent plaintiff the deprivation for several years of a mere $19 million to which it is concededly entitled can never amount to "harsh circumstances." As Judge Rosenn persuasively demonstrates,[7] this unprecedented result defies common sense, economic reality, and a square holding to the contrary by the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). At the very least, Judge Rosenn's carefully limited position—that financial hardship to a solvent debtor should be cognizable in a Rule 54(b) determination under the circumstances of this case—is surely correct.

I would go further. Rule 54(b) allows the entry of judgment on a proven or admitted claim when there is "no just reason" for delaying that judgment. By entering that

[7] Dissenting Opinion at 6-10.

judgment, the district court puts a litigant who would not otherwise be entitled to immediate possession of the disputed fund in a position to execute on the judgment and obtain that fund immediately. In a civil damage action between two solvent parties, it would therefore seem that a needless delay in obtaining possession of a substantial sum of money to which one is entitled under a valid judgment is the *precise* "harsh circumstance" that Rule 54(b) is intended to prevent. The proper rule is that when the district court has determined, as it did here, that "no just reason" exists to delay the entry of judgment, the continued loss of the right to execute on that judgment or obtain a supersedeas bond is *prima facie* an injustice sufficient to support the certification of finality.

Whether one accepts Judge Rosenn's position or mine, however, it is clear that the panel majority's holding is inconsistent with the policy and purposes of Rule 54(b).

VI. Conclusion

Judge Rosenn's dissent demonstrates as well as any opinion can that the panel majority holdings in this case are unsupported by precedent. From what has been said in this opinion, it should also be apparent that these holdings directly undermine the policies which Rule 54(b) seeks to advance. If followed, their effect, I submit, will be to bar the use of Rule 54(b) in "the very kind of case for which Rule 54(b) [was] designed," *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445, 451 (1951), and to eliminate a significant tool for district court management of the disposition of litigation. Rehearing *en banc* is far more warranted in this case than in many for which we have convened the full court in recent years.

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Moreover, given the conflict between this case and the holding of the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemity Co., supra,* and the recognized lack of coherent standards for the review of Rule 54 certifications, *see* 10 C. Wright & A. Miller, Federal Practice *& Procedure* § 2655 at 39 (1973), this case seems a proper occasion[8] for the Supreme Court to break its 23 year silence regarding the proper administration of Rule 54(b) and to provide some much needed guidance to the courts of appeals and to this court especially.

Judge Rosenn joins in this dissent and votes for rehearing *en banc.*

For the reasons pointed out by Judge Rosenn and Judge Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[8] This is particularly the case where, as here, because of recusals only three of seven eligible judges have voted against rehearing *en banc.*

APPENDIX D

Selected Portions of Plaintiff's Interrogatories to Defendant

INTERROGATORY 54

As to each instance in which plaintiff has been unjustly enriched as alleged in paragraph 32 of the Counterclaim:

(a) State the date thereof;

Approximately 1970 through 1973.

(b) State in detail all facts which allegedly support the allegation;

Plaintiff has been unjustly enriched in that Defendant, without compensation from Plaintiff, (i) performed work which was the contractual responsibility of Plaintiff; (ii) prevented substantial losses which otherwise would have befallen Plaintiff; and (iii) averted a probable total default in contract performance.

In addition, Plaintiff has been paid for work which it was contractually obligated to perform, but which in fact was partly performed by Defendant. This included specific advice and assistance for the establishment of adequate training and quality control programs.

These facts are shown by the following subsidiary facts or events, among others:

(1) That Plaintiff underestimated the work and encountered severe difficulties in performance is admitted by the Complaint (*e.g.,* ¶¶ 72-74, 81-84, 109).

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(2) To prevent a severe default by Plaintiff and grave damage to the timely production of components for the Naval Nuclear Program, Defendant (as well as the Navy) had to render advice and assistance to Plaintiff repeatedly in areas of Plaintiff's management responsibility. These included the establishment and conduct of an adequate training program for welders; the need to explain to Plaintiff its deficiencies in instituting systematic quality control measures; the need to follow up repeatedly because of Plaintiff's unwillingness or inability to carry out suggestions concerning the management of its work; and the need to undertake repeated and extraordinary inspections and to recommend corrective measures due to Plaintiff's unacceptable incidences of defective welding. Under the purhase orders, all of these items were the responsibility of Plaintiff, not Defendant. See also answers to Interrogatories 20 and 25 *supra*.

(3) Plaintiff during the period approximately 1970-73 demonstrated no capacity to resolve without such assistance from Defendant (as well as the Navy) its problems stemming from poor workmanship and inadequate training, inspection, and quality control programs. It is reasonably expectable, therefore, that without the extraordinary assistance rendered by Defendant, the problems would not have been resolved, Plaintiff would have suffered great losses, and would have so seriously breached its obligations to supply conforming articles, within agreed upon delivery schedules, as to be in total default on the purchase orders.

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(c) Identify all persons who have knowledge of each fact;

See answers to Interrogatories 20 and 25 *supra*.

(d) Identify each document which discusses, reflects, refers or in any way relates thereto.

See answers to Interrogatories 20 and 25 *supra*.

INTERROGATORY 61

(a) Set forth the total dollar amount of damages claimed by Defendant under Count I of the Counterclaim.

Approximately $1,912,000.

(b) Separately, as to each element of damages, including but not limited to costs or expenses incurred, and/or lost profits, which Defendant seeks to recover under Count I of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

By Count I, Defendant seeks to recover excess costs and expenses incurred in the following approximate amounts for approximately the years 1970-1973:

1970 — $425,000

1971 — $577,000

1972 — $485,000

1973 — $425,000

(ii) Set forth in detail the substance and purpose thereof;

See responses to Interrogatories 20, 25, 45-47, 54-56 (First Set).

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(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto.

W. H. Bruggeman

C. R. Stahl

The Managers of the Machinery Apparatus Operation ("M.A.O.") Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period (approximately 1970-1973) (See response to Interrogatory 2(c) (First Set).)

The Subsection Managers, of Purchasing and Engineering, for the M.A.O. Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period. (See response to Interrogatory 2(c) (First Set).)

J. W. Vaughan

When seeking payment from the Government pursuant to its prime contracts with the Navy, Defendant submits its Public Vouchers for Purchases and Services other than Personal to the Defense Contract Audit Agency ("DCAA"), which forwards the Vouchers to the Defense Contract Administration Services Region ("DCASR") in Boston, Massachusetts. Payment to Defendant issues from DCASR.

In addition to the foregoing, information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which records include but are not limited to the following or portions thereof:

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Minutes of Meetings between ANSTR and the General Manager of M.A.O.

Minutes of Meetings between Admiral Rickover and the General Manager of M.A.O.

Files of W. A. Northrop

Documents listed in response to Interrogatory 20(c)(v) (First Set)

See also responses to Interrogatories 25(b)(v), 45(c)(v), and 47(b) (First Set).

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontractors involved in this action.

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations.

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Total M.A.O. Labor (Large Components Only)	$875	$874	$872	$870	$3491
Percentage of Normal Labor Allocable to Plaintiff	50.9%	67.2%	55.6%	48.6%	55.5%
Normal Labor Assocable to Plaintiff	$445	$587	$484	$422	$1938

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II. Distribution of Normal Labor Allocable to Plaintiff within M.A.O.:

Reactor Equipment Section—35.7%

Heat Exchangers and Pressurizers Section—49.3%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —15.0%

III. Estimated Percentages in Excess of Normal Labor Expended for Plaintiff During Approximately 1970-1973:

Reactor Equipment Section—100%

Heat Exchangers and Pressurizers Section—25%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —30%

IV. Calculation of Excess Costs and Expenses Incurred:

Formula—Normal Labor Allocable to Plaintiff X Distribution of Normal Labor Allocable to Plaintiff X Estimated Percentages in Excess of Normal Labor; Plus General and Administrative Expenses and Overhead

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Reactor Equipment Section	$159	$209	$173	$151	$ 692
Heat Exchangers and Pressurizers Section	$ 55	$ 72	$ 60	$ 52	$ 239

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	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous	$ 20	$ 26	$ 22	$ 19	$ 87
Subtotal	$234	$307	$255	$222	$1018
Add G & A and Overhead	$191	$270	$230	$203	$ 894
TOTAL COST	$425	$577	$485	$425	$1912

Calculations of the nature set forth above were made on or about June 7, 1977, by J. Russell, with W. A. Northrop, R. Savidge, P. Jones, J. Lavish, and R. Henke, and were reviewed by F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made by J. Russell on or about May 2, 1978, and were reviewed by E. A. Klein and W. A. Northrop.

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy.

For the ultimate benefit of the United States. Such recovery will initially be by, and payment made to Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof.

Yes. Information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be

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made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which record include but are not limited to the following or portions thereof:

> "Public Voucher[s] for Purchases and Services other than Personal" produced by letter dated July 28, 1977.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See response to Interrogatory 61(b)(viii) *supra.*

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government thereof;

Prime contracts:

N0024-67-C-5014

N0024-67-C-5016

N0024-67-C-5321

N0024-69-C-5154

N0024-70-C-5027

N0024-71-C-5461

N0024-72-C-5514

N0024-73-C-5024

N0024-74-C-5009

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All the prime contracts listed above are cost-plus-fixed-fee contracts. By their very nature, therefore, they provide for the reimbursement by the Government of allowable costs incurred by Defendant. In addition, this subject is treated in the Article in the General Provisions of each prime contract entitled "Allowable Costs, Fixed Fee, And Payment."

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

Defendant objects to this Interrogatory to the extent that it seeks information which constitutes trade secrets or proprietary information, or information or documents which are protected by the work product privilege or are irrelevant or not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Defendant makes the following answer.

See responses to Interrogatories 61(b)(ii), 61(b)(iii) and 61(b)(viii) *supra.*

Prime contracts

The twenty-one subcontracts involved in this action.

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INTERROGATORY 69

(a) Set forth the total dollar amount of damages claimed by Defendant under Count V of the Counterclaim.

In excess of $53,993,023.

By Count V of its Counterclaim, Defendant seeks to recover (1) the value of the benefit conferred upon Plaintiff as a result of the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set); and (2) amounts constituting the unjust enrichment of Plaintiff resulting from Plaintiff's avoidance of increased costs, substantial losses, and termination-for-default damages as a result of the extraordinary assistance provided by Defendant. With respect to the value of the benefit conferred upon Plaintiff, the total dollar amount is related to the increased costs which Plaintiff would have incurred but for Defendant's extraordinary assistance. Defendant at present has insufficient information to derive or ascertain the total amount of these costs, but such amount exceeds the estimated $1,912,000 that represents the approximate costs incurred by Defendant in rendering the extraordinary assistance. With respect to the remaining damages sought by Count V, (1) Defendant at present has insufficient information to derive or ascertain the increased costs or losses which Plaintiff would have incurred had not Defendant rendered extraordinary assistance; and (2) an estimate of the total damages for which Plaintiff would have been liable had it been terminated for default is $52,081,023.

(b) Separately, as to each element of damages, including but not limited to unjust enrichment, benefit con-

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ferred, loss to Plaintiff prevented, and/or lost profits, which Defendant seeks to recover under Count V of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

With respect to the value of the benefit conferred upon Plaintiff, Defendant at present has insufficient information to respond to this Interrogatory. With respect to the remaining damages sought by Count V, such damages are not divisible in the manner requested in this Interrogatory 69(a) *supra.*

(ii) Set forth in detail the nature thereof;

See response to Interrogatory 69(a) *supra.*

(iii) Identify the subcontract(s) under which or in connection with which it occurred;

Each of the twenty-one subcontracts involved in this action.

(iv) Set forth the exact dollar amount thereof;

See response to Interrogatory 69(a) *supra.*

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

With respect to the value of the benefit conferred upon Plaintiff as a result of the extraordinary assistance provided by Defendant, see responses to Interrogatories 61(b)(v) and 69(a) *supra.* With respect to amounts constituting the unjust enrichment of Plaintiff resulting from Plain-

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tiff's avoidance of increased costs and substantial losses, see response to Interrogatory 69(a) *supra*. The following is an estimate of the termination-for-default damages avoided by Plaintiff as a result of Defendant's extraordinary assistance:

Assume termination for default on December 31, 1972.

Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
A-550	$ 1,011,604	$ 687,890	$ 5,231,983
A-595	$ 497,287	$ 338,155	$ 1,575,929
A-641	$ 412,778	$ 280,689	$ 1,549,180
A-642	$ 231,498	$ 157,419	$ 1,223,047
A-656	$ 937,980	$ 637,827	$ 3,189,417
A-661	$ 753,827	$ 512,602	$ 2,336,437
A-675	$ 684,462	$ 465,434	$ 1,825,180
A113	—	—	$ 290,856
B382	$ 396,529	$ 269,639	$ 864,032
B-412	$ 358,496	$ 243,777	$ 897,376
B-423	$ 56,773	$ 38,606	$ 196,759
B-433	$ 284,835	$ 193,688	$ 823,416
B-384	$ 532,689	$ 362,228	$ 2,916,046
B-425	$ 351,532	$ 239,041	$ 838,082

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Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
B-429	$ 1,049,045	$ 813,351	$ 3,033,045
B-452	$ 1,248,498	$ 565,986	$ 2,599,712
B-478	—	—	$ 637,932
B-410	$ 970,148	$ 439,800	$ 3,010,500
B-442	$ 158,849	$ 108,017	$ 627,460
B-451	$ 66,354	$ 45,120	$ 381,755
B-428	$ 452,940	$ 307,999	$ 869,487
TOTAL	$10,456,124	$6,707,268	$34,917,631

Total Estimated Termination-for-Default Damages:

$10,456,124
6,707,268
34,917,631
$52,081,023

Calculations of the nature set forth above were made on or about June 2-6, 1977, and were reviewed by E. A. Klein, J. Holup, F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made on or about April 26, 1978, by A. Keating, J. McKeon, P. Smith, M. Ottati, T. Fallon, J. Maslyn, R. Buck, H. L. D. Boone and D. Fawl; and were reviewed by J. Grout, J. Holup, E. A. Klein and W. A. Northrop.

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(vi) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See response to Interrogatory 61(b)(iii) *supra*.

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

For the benefit of Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

Not applicable.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursment and the date thereof;

Not applicable.

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

Not applicable.

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor.

If no reasons were given, so state;

Not applicable.

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(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

See response to Interrogatory 61(b)(xii) *supra*.

(c) State whether the damages claimed by Defendant under Count V of the Counterclaim are in addition to the damages claimed by Defendant under either Counts I, II, III, or IV or whether Count V sets forth an alternate legal theory for recovering damages which Defendant seeks to recover under either Counts I, II, II [*sic*] or IV.

In addition to the damages sought by Counts I—IV of Defendant's Counterclaim.

INTERROGATORY 74

(a) State whether Defendant seeks to recover or set off any element of damage, including but not limited to costs or expenses, lost profits and/or unjust enrichment as the result of any instance of assistance to Plaintiff as set forth in the response to Interrogatories 71 and 72, *supra*.

Yes.

(b) Separately, as to each such instance:

(i) Set forth in detail the substance and purpose of the assistance provided and the date(s) on which it was provided;

See responses to Interrogatories 71(b)(i), 71(b)(ii), 72 and 73(a)(i)-(ii) *supra*.

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(ii) Identify the persons who provided the assistance and the persons to whom it was provided;

See responses to Interrogatories 61(b)(ii), 72(b)(iii), 72(d)(iv), and 73(a)(iii) *supra.*

(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See responses to Interrogatories 71(b)(iii), 72 and 73 (a)(iii) *supra.*

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontracts involved in this action.

(v) Set forth the exact dollar amount thereof;

By Counts I-IV of its Counterclaim, Defendant seeks to recover the cost of only the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set). As to an estimate of the dollar amount sought for this extraordinary assistance, and how it was calculated, see responses to Interrogatories 61(a), 61(b)(v), 63(a), 63(b)(v), 65(a), 65(b)(v), 67(a) and 67 (b)(v) *supra.* The cumulative effect of *all* the assistance provided to Plaintiff by Defendant was the prevention of substantial costs and losses which would have otherwise been incurred by Plaintiff and the avoidance by Plaintiff of substantial damages which would have otherwise arisen if Plaintiff had defaulted on the twenty-one

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subcontracts. By Count V of its Counterclaim, Defendant seeks the recovery of these benefits conferred upon Plaintiff, or costs, losses, and damages avoided. As to an estimate of the dollar amount sought by Count V, and how it was calculated, see responses to Interrogatories 69(a) and 69(b)(v) *supra.*

(vi) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

See response to Interrogatory 74(b)(v) *supra.*

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

See responses to Interrogatories 61(b)(vii), 61(b)(vii), 65(b)(vii), 67(b)(vii) and 69(b)(vii) *supra.*

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

See responses to Interrogatories 61(b)(viii), 63(b)(viii), 65(b)(viii), 67(b)(viii), and 69(b)(viii) *supra.*

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See responses to Interrogatories 61(b)(ix), 63(b)(ix), 65(b)(ix), 67(b)(ix), 69(b)(ix) *supra.*

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(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

See responses to Interrogatories 61(b)(x), 63(b)(x), 65(b)(x), 67(b)(x), and 69(b)(x) *supra.*

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Set forth the date(s) on which Defendant demanded compensation or notified Plaintiff of an intention to set off and identify each person who made such demand or gave such notice and each person upon whom demand or notice was made. If no demand was made or notice given, so state;

See responses to Interrogatories 62(a)(vii), 64(a) (vii), 66(a)(vii), 68(a)(vii), and 70(a)(vii) *supra.*

(xiii) Set forth the date on which Defendant and/or the Government decided that a claim should be made against Plaintiff and identify each person who was involved in so deciding;

See responses to Interrogatories 62(a)(viii), 64(a) (viii), 66(a)(viii), 68(a)(viii), and 70(a)(viii) *supra.*

(xiv) Set forth the date on which Defendant and/or the Government began to maintain a record or account thereof and identify each person who maintained such record or account;

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See responses to Interrogatories 62(a)(ix), 64(a)(ix), 66(a)(ix), 68(a)(ix),and 70(a)(ix) *supra.*

(xv) Separately, as to each subparagraph (i)-(xiv), *supra,* identify each document which discusses, reflects, concerns, or relates to the response thereto.

See responses to Interrogatories 61(b)(xii), 62(a)(xi), 63(b)(xii), 64(a)(xi), 65(b)(xii), 66(a)(xi), 67(b)(xii), 68(a)(xi), 69(b)(xii), 70(a)(xi), 72(a)(ii), 72(b)(ii), 72(c)(iii), 72(d)(v), and 73(b) *supra.*